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To: Susanne Diaz, Examiner USPTO **From:** Elliot Goldberg
Fax: 703-746-7048 **Date:** June 30, 2004
Phone: **Pages:** 26 (including cover sheet) *Twenty-six*
Your Ref.: 08/900,360 **Our Ref.:** 2569-103P
Re: **CC:**

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Papers Filed herewith on: 6-17-04 23
DOCKET NO.: 2569-0103P ATTY: TCB/LEAG
APPLICANT(S): WELLS O'BRECHT
APPLN. NO: 08700, 260 FILED: 7-25-97
PAT NO.: _____

☐ New Application with Transmittal Letter
☐ Utility ☐ Design ☐ CIP ☐ PCT ☐ Provisional
☐ Filing Under 37 CFR 1.53(b) ☐ CONT ☐ DIV
☐ Filing Under 37 CFR 1.114(RCE)
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MS APPEAL BRIEF - PATENTS
PATENT
2569-103P

IN RE APPLICATION OF BEFORE THE BOARD OF APPEALS

Wells OBRECHT

Appeal No.:

Conf.: 8032

Appl. No.: 08/900,360

Group: 2765

Filed: July 25, 1997

Examiner: MEINECKE DIAZ, S.

For: METHOD AND APPARATUS FOR PROCURING
GOODS IN AN AUTOMATED MANNERAPPEAL BRIEF TRANSMITTAL FORMMS APPEAL BRIEF - PATENTS
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

June 17, 2004

Sir:

Transmitted herewith is an Appeal Brief (in triplicate) on behalf of the Appellants in connection with the above-identified application.

☐ The enclosed document is being transmitted via the Certificate of Mailing provisions of 37 C.F.R. § 1.8.

A Notice of Appeal was filed on April 22, 2004.

☒ Applicant claims small entity status in accordance with 37 C.F.R. § 1.27

The fee has been calculated as shown below:

☐ Extension of time fee pursuant to 37 C.F.R. §§ 1.17 and 1.136(a) - \$0.00.

☒ Fee for filing an Appeal Brief - \$165.00 (small entity).

☒ Check(s) in the amount of \$165.00 is(are) attached.

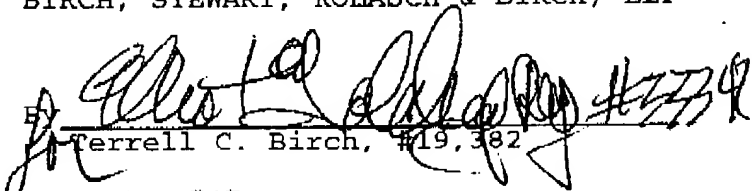
☐ Please charge Deposit Account No. 02-2448 in the amount of \$0.00. A triplicate copy of this sheet is attached.

Appl. No. 08/900,360

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

Respectfully submitted,

BIRCH, STEWART, KOLASCH & BIRCH, LLP


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2569-0103P

Attachment(s)

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GOODS IN AN AUTOMATED MANNER**APPEAL BRIEF**

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For: METHOD AND APPARATUS FOR PROCURING
GOODS IN AN AUTOMATED MANNER

APPEAL BRIEF

Assistant Commissioner for Patents
Washington, D.C. 20231

June 17, 2004

Sir:

I. **REAL PARTY IN INTEREST**

The real party in interest in this application is the inventor, Wells Obrecht, 509 Edgevale Road, Baltimore, Maryland 21210.

II. **RELATED APPEALS AND INTERFERENCES**

There are no related appeals and interferences regarding the subject matter of the present application. A prior favorable Decision was made by the Board on September 25, 2003.

III. **STATUS OF CLAIMS**

Claims 1-20 are pending and they have been rejected.

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IV. STATUS OF AMENDMENTS

An Amendment was filed on June 17, 2004. This Amendment was directed to changes suggested by the Examiner regarding an objection of two (2) claims (claims 15 and 19) and the rejection of claims 1-9, and 18 under 35 U.S.C. §112, second paragraph.

It is assumed that this Amendment will be entered as it reduces issues for appeal and a good and sufficient reason has been provided why the amendment was not earlier presented.

V. SUMMARY OF THE INVENTION

The present application is directed to a method and apparatus for purchasing goods or services from a seller which includes, for example, a computer and the use of an internet connection as well as a central computer. In the method, a request is received from a buyer for goods or services with a plurality of criteria (attributes) relating to the seller, of the goods and services. For example, the criteria can be the location of the seller, customer satisfaction of seller (CSI) (e.g. page 15 of the specification) preferred for purchasing the type of goods or services required. If the criteria is color or more details of the goods they are set forth. For example, if the item is an automobile that is requested, the particular features of the automobile desired are set forth.

Thereafter, this information is sent to a central computer and the central computer based on the criteria selects at least two sellers from a predetermined group. Thereafter, the buyer's request is submitted to at

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least some of the sellers and the sellers within a predetermined time interval respond via the computer. The information sent from the sellers is compiled and the sellers are ranked based on the compiled information including the criteria set forth by the buyer. Thereafter, sellers are selected with the relatively highest ranking and this information is sent to the buyer so that the buyer may choose which seller he prefers based on his criteria.

In the apparatus, there is a computer with an input means for receiving a request for a desired good such as an automobile, for example, from a perspective buyer. The request includes a plurality of predetermined criteria. The central computer is a selecting means for selecting at least two providers (sellers) from a predetermined group of providers. There is an internet connection for transmitting the request of the buyer to the selected provider. The central computer receives responses from the selected providers. There is a computation means including the central computer for compiling information provided in responses received within a predetermined time interval for ranking the providers based upon the compiled information including a plurality of criteria provided by the buyer. Thereafter, there is an output means including an internet connection for providing the compiled responses of the selected providers for access by the prospective buyer.

The apparatus is generally shown in Figure 1 and in Figure 2 there is an overview of the method.

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The above summary of the invention has been made to comply with the requirements set forth for filing briefs in the U.S. Patent Office. The statements above are not to be considered as limiting to the claimed invention in the context claimed.

VI. ISSUES

- A. Whether the objection to claims 15 and 19 has been overcome.
- B. Whether the rejection of claims 1-9, 17 and 18 under 35 U.S.C. §112, has been overcome.
- C. Whether the rejection of claims 1 and 2 as being non-statutory is proper and legally correct.
- D. Whether the rejection of claims 1-3 under 35 U.S.C. §103 as set forth in the Office Action is proper and legally correct.
- E. Whether the rejection of claims 4-20 under 35 U.S.C. §103 is proper and legally correct.

VII. GROUPING OF CLAIMS

- I. Claims 1 and 2 are separately grouped and stand and fall alone.
- II. Claims 3 and 4 are grouped together and stand or fall together.
- III. Claim 5 is separately grouped and stands or falls alone.
- IV. Claims 6-9 are grouped together and stand or fall together.
- V. Claims 10 and 11 are grouped together and stand or fall together.

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- VI. Claims 12 and 13 are grouped together and stand or fall together.
- VII. Claims 14-18 are grouped together and stand or fall together.
- VIII. Claim 15 is separately grouped and stands or falls alone.
- IX. Claims 19 and 20 are grouped together and stand or fall together.

The arguments of the separately grouped claims as set forth below comply with 37 C.F.R. 1.192 and more importantly with the doctrine set forth in *In re Beaver* 13 USPQ2d 1409 (FED. CIR. 1989).

VIII. ARGUMENT

A. Comments as to the objection of claims 15 and 19 as set forth in the Office Action.

The Examiner identified some typing omissions in claims 15 and 19. These have been corrected in an Amendment filed concurrently with this Brief. Accordingly, it is submitted that the objections are now moot.

B. Arguments with respect to the rejections of claims 1-9, 17 and 18 under 35 U.S.C. §112, second paragraph.

In the Office Action, the Examiner rejected claims 1-9, 17 and 18 regarding an alleged antecedent problem.

Initially it is submitted that this rejection is *void abinitio*. The claims in the present format before the last Office Action were reviewed approximately eight (8) times by the Examiner, which included four (4)

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remands by the Board and for the first time the Examiner now rejects the claims under 35 USC §112. Under 37 C.F.R. §1.198 the prosecution has been reopened. There is no statement why there is sufficient cause as mandated in 37 C.F.R. 1,198 to reopen the prosecution under 35 USC §112, second paragraph.

It is submitted that the Board when reviewing these claims clearly understood the scope of these claims and did not read the claims in a vacuum. That is, it is submitted that the Board read these claims based on the specification which is mandated by the case of *In re Moore and Janowski* 169 USPQ, 236 (CCPA 1971) wherein the court stated as follows:

Definiteness of language employed in claims must be analyzed - not in a vacuum but always in light of the teachings of the prior art and the particular application disclosure as would be interpreted by one possessing ordinary skill in the pertinent art

To reduce issues for appeal, the claims have been amended to alleviate the Examiner's concerns regarding the wording of the claims and accordingly it is submitted that the rejection if proper under 35 USC §112, second paragraph has been overcome.

C. Argument regarding the rejection of claims 1 and 2 as being non-statutory.

Initially, the substance of these claims was considered by the Board of Appeals in a decision dated September 25, 2003. The Examiner has now provided a new ground of rejection which is under 35 U.S.C.

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§101 based on these claims. While the undersigned was notified why a new rejection under 35 U.S.C. §103 was being made on new art (see the Interview Summary from the SPE dated December 10, 2003), there is no good and sufficient reason after being reviewed approximately eight (8) times, why a rejection under 35 U.S.C. §101 is being made. See, 37 CFR 1.198.

Certainly, the Board of Appeals in their decision did not make any ground of rejection under 35 U.S.C. §101 and accordingly, these claims, it is submitted, were considered complying with 35 U.S.C. §101 also in view of a lack of a rejection by the Board.

Secondly, the rejection under 35 U.S.C. §101 is not legally correct. Apparently, it is the Examiner's position that these claims are not drawn to a "technological improvement." But anything under the sun can be patented, if there is no art applied. These claims include viable steps for performing the function as explained in the specification. The Examiner's major comment is that "the recited steps could be performed manually by a human and therefore do not necessarily apply, involve, use or advance the technological art." Here the Examiner is apparently asserting that the claims do not comply with 35 U.S.C. §101 because they could be performed manually. But the courts have treated this assertion in the case of *State Street Bank and Trust Co. v. Signature Financial Group Inc.*, 47 USPQ2nd, 1596 (CAFC 1998). In that case, the court stated as follows:

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Whether the patents claims are too broad to be patentable is not to be judged under section 101, but rather under sections 102, 103 and 112.

Assuming the above statement of the Examiner to be correct, it has nothing to do with whether what is claimed is statutory subject matter.

In summary, the Examiner's comments that the steps could be performed manually is not a proper reason to reject the claims under 35 U.S.C. §101 as set forth by the court as noted *supra*.

Also, claim 2 was rejected because it was asserted that the recitation of computer was not directed to technological art because it was broader than technological art. Actually, claim 2 is statutory for the same reasons as its base claim 1 and further, the Examiner's argument appears to be directed not to 35 U.S.C. §101, but to 35 U.S.C. §102 or §103.

Additionally, the Examiner asserts that the process of claims 1 and 2 is not directed to a "technological" item. But the Examiner's undefined definition of technology is not clear. Technology can be "the system by which a society provides its members with those things needed or desired."¹ The process claimed in claims 1 and 2 clearly meet the definition of technology as explained in the cited quotation of the definition of technology.

For the reasons set forth above, it is requested that the rejection under 35 U.S.C. §101 be withdrawn or reversed.

¹ Webster's New World Dictionary of American English (Third College Edition) 1989.

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Arguments as to the rejections under 35 U.S.C. §103

Claims 1-3 were rejected under 35 U.S.C. §103(a) as being unpatentable over CarBargains as disclosed in the references. The references are identified in the listing of references on page 15.

The Examiner used McKenzie, Barciela, P.R. Newswire, Laugesen, in view of Interax as disclosed in the article "Honestly the Best Policy."

The Examiner set forth paragraphs in the four basic references to reject the claims.

Initially directing attention to claim 1, the Examiner correctly indicated that McKenzie did call at least 5 dealers who then submit bids. The Examiner then speculates "presumably, CarBargains [McKenzie] is contacting dealerships who they know at least sell the desired make or car, e.g., Lexus, Honda, etc." But this statement does not address the specific step in claim 1 of "selecting at least two sellers from a predetermined group of sellers of the goods or services based on a received predetermined plurality of criteria." (Emphasis added)

In McKenzie, there is no specific or inherent disclosure that the sellers have been predetermined. As explained in the present specification, these prestored sellers can be in memory as identified for example, on page 7, last full paragraph of the specification. In McKenzie, what is apparently done is that McKenzie is performing the services of a "personal shopper."

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For example, McKenzie after receiving the request for a specific automobile, possibly in some undisclosed method would find the dealers to call by telephone.

But there is no disclosure or suggestions that these dealers (sellers) define a "pre-determined group" in the context claim. There is no suggestion in McKenzie regarding a prestored seller, as explained above.

With respect to claim 2 while the computers are known there is no motivating reason to provide a computer with the steps of claim 1.

Also, with respect to claim 3, the step of selecting is done by a central computer which is not shown or suggested by the references.

At least recognizing that the base references do not disclose "a ranking of the sellers based upon the compiled information including the plurality of criteria and selecting sellers with the relatively highest ratings," the Examiner relies on Interax with the assertion that this makes up the deficiencies of the base references. As set forth in the Office Action, Interax "provides a device which captured a customer's individual requirements and provided a list of insurance companies instead of simply obtaining one quote at a time. The list was ranked in order, not just by cost, but also by projected bonuses and past performances as well. ("Honestly the Best Policy," page 33, col. 2).

Also in Interax one of the items considered include projected bonuses. How this relates to criteria of the buyer is not understood.

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This may be related to the ultimate price. Also Interax does not cure the innate deficiencies of the base references.

Also, in rejecting the claims, the Examiner has concentrated not on the combination as a whole, as required by 35 U.S.C. §103, but has merely concentrated on the substitution of steps. See *Hybitech Inc. v. Monoclonal Antibodies, Inc.*, 231 USPQ 81 (Fed. Cir. 1986), wherein the court stated as follows:

"Focusing on the obviousness of substitutions and differences instead of the invention as a whole . . . was a legally improper way to simplify the difficult determination of obviousness. See generally, *Hodoshblock Drug Co.* 786 F.2d 1136, 229 USPQ 182 (Fed. Cir. 1986).

Argument as to the rejection of claims 4-20 under 35 U.S.C. §103(a) as being unpatentable over CarBargains [CarBargains relates to the four basic references applied in the rejection of claim 1 supra] in view of Interax as disclosed in the article "Honestly the Best Policy" as applied to claim 3 above and, further in view of Riley.

With respect to claim 4 while an internet is known there is no suggestion to use the internet in claims 4/3/2/1 without benefit of applicant's disclosure.

In claim 5, step d which relates to step d in claim 1, where receiving is done by a central computer.

In claim 6, which depends on claim 5, wherein the steps (e) and (f) relating to the steps in claim 1 is also performed by the central computer. There is no suggestion that the steps added in claims 5 and 6

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should be performed by the central computer as defined in the specification. The citation of Riley does not cure the innate deficiencies of a rejection based on the references applied to claim 3.

Claim 10 is directed to the apparatus (system) for obtaining information for the purchasing of goods or services. There is a selection means for selecting at least two providers from a predetermined group of providers As explained in the reply to the rejection of claim 1, CarBargains in view of Interax does not suggest what has been claimed. Although in the heading of the rejection, the Riley reference was cited as the Riley reference was not explained with respect to claims 10-18. Riley is a phantom reference for this rejection. In any case, Riley does not cure the innate deficiencies of a rejection based on the first cited references.

Again, it appears that the Examiner is only concentrating on the substitution of the elements which is improper as set forth in *Hybritech Inc. v. Monoclonal Antibodies, Inc.* (cited and explained above), which is incorporated herein.

With respect to claim 12, the selection means is further defined as a central computer. This is not shown or suggested by the references applied.

With respect to claim 14 which depends on claim 13, this provides also that the reception means includes a central computer. This is not disclosed or suggested by the references applied.

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Claim 15 which is dependent on claim 14 requires that the computation means include the central computer. This combination is not shown or suggested by the references.

With respect to claim 19, this is a system directed to the purchasing of automobiles. This claim includes means and its function. Although the Examiner states that the rejection of claim 19 was addressed in the rejection of claims 1-9, this is not understood.

Claim 19 is directed to a system which recites five means and their function. As expressed in the Reply to the rejections of claims 1 and 10, the structure claimed is not shown or suggested by the art applied. Additionally, while the heading of the rejection included Riley, Riley was not discussed in the rejection of claim 19.

**Summary of the Arguments Regarding the Rejections Under 35
U.S.C. §103**

In rejecting the claims under 35 U.S.C. §103, the Examiner has not established a *prima facie* case of obviousness. Initially, even if the references can be combined, there is no suggestion of a structure or steps in the context claimed.

For example, as set forth in the argument to the rejection of claim 1, there is no predetermined groups of sellers in the context claimed.

Also, outside of the applicants' own disclosure, there is no suggestion (motivation) to combine the references. Apparently, as stated

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above, the Examiner has only considered the substitution of elements and not the combination as a whole.

Also, the present method claims and apparatus claims provide a very efficient way to obtain goods and services as disclosed in the specification. These are results that apparently have not been considered by the Examiner. See, *The Gillette Co. v. S.C. Johnson and Sons, Inc.*, 16 USPQ2d, 1923, 1928 (Fed. Cir. 1990), wherein the court stated as follows:

An analysis of obviousness of a claimed combination must include consideration of the results achieved by the combination.

Even if the references cited show all the steps or elements claimed, which they do not as explained above, it is the combination that counts. This doctrine has existed in patent law for years and is still the law. See the case of *Ruben Condenser Co. v. Copeland Refrigeration Corporation*, 85 F.2d 537, 541 31 USPQ 6 (C.A. 21936) wherein the court stated as follows:

We do not of course forget that it is always the combination that counts, and that no patent, or almost none are made up of new elements.... (Emphasis added)

Additionally, it appears from the rejection that the Examiner is asserting that one skilled in the art would have had the capability of arriving at the combination. But capability is not equal to obviousness. See *Ex parte Levingood*, 28 USPQ2nd, 1300, 1301 (BPAI 1993), wherein the Board stated as follows:

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At best, the Examiner's comments regarding obviousness amount to an assertion that one of ordinary skill in the relevant art would have been able to arrive at the appellant's invention because he had the necessary skills to carry out the requisite process steps. This is an inappropriate stand for obviousness. (Emphasis added)

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IX. REFERENCES OF RECORD

- A. McKenzie ("Car Sales Firm Represents Buyers Looking for a Good Deal"); hereinafter "McKenzie," July 1992
- B. Barciela ("Need a Car But Hate to Haggle? Service will Negotiate for You"); hereinafter "Barciela," March 1992
- C. PR Newswire ("Southern California Gets New Service That Makes Car Dealers Bid for Customer's Business"); hereinafter "PR Newswire," January 1992
- D. Laugesen ("Here's a New Way of Buying a Car"); hereinafter "Laugesen," September 1992
- E. Interax, as disclosed on pages 32 and 33 of article, "Honestly the Best Policy," hereinafter "Interax," 1987
- F. Reilly, ("Firms Join Virtual Marketplace"), hereinafter "Reilly," 1994

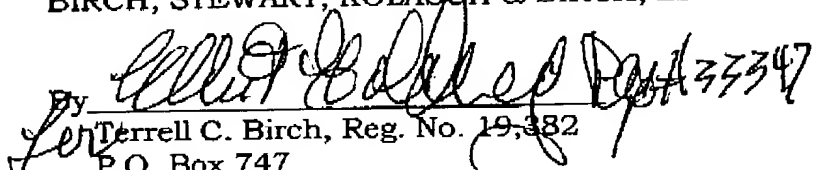
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Conclusion

For the reasons set forth above, it is requested that the Examiner's rejections of the claims be reversed.

Respectfully submitted,

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APPENDIX OF CLAIMS

Claim 1 A method for purchasing goods or services from a seller by a buyer comprising:

- (a) receiving a request from a buyer for goods or services with a predetermined plurality of criteria related to the goods or services;
- (b) selecting at least two sellers from a predetermined group of sellers of the goods or services based on the received predetermined plurality of criteria;
- (c) transmitting the request of the buyer to the selected at least two sellers of the goods or services;
- (d) receiving, within a predetermined time interval, responses from the at least two sellers to the request;
- (e) compiling information provided in the responses received from at least one seller within the predetermined time interval;
- (f) ranking the sellers based upon the compiled information including the plurality of criteria and selecting sellers with the relatively highest ranking; and
- (g) providing the compiled responses of the selected sellers for access by the buyer.

Claim 2 The method of claim 1, wherein in (a), a computer receives the request.

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Claim 3 The method of claim 2, wherein in (b), selecting is performed by a central computer.

Claim 4 The method of claim 3, wherein in (c), transmitting is done by an internet system.

Claim 5 The method of claim 4, wherein in (d), receiving is done by the central computer.

Claim 6 The method of claim 5, wherein in (e) and (f), the compiling and ranking is performed by the central computer.

Claim 7 The method of claim 6, wherein in (g), accessing by the buyer is performed by an internet connection.

Claim 8 The method of claim 7, wherein the goods are selected from the group consisting of vehicles, computers, or appliances and the services are selected from the groups consisting of legal, financing, medical, or insurance.

Claim 9 The method according to claim 8, wherein the goods are vehicles.

Claim 10 A system for obtaining information for the purchasing of goods or services comprising:

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input means for receiving a request for desired goods or services from a buyer, the request including predetermined criteria related to the goods or services;

selection means for selecting at least two providers from a predetermined group of providers of the goods or services based on the predetermined criteria;

transmission means for transmitting the request of the buyer to the selected providers;

reception means for receiving, within a predetermined time interval, response from the selected providers;

computation means for compiling information provided in the response received within the predetermined time interval for ranking the sellers based upon the compiled information, and for selecting sellers with the relatively highest ranking; and

output means for providing the compiled responses of the selected sellers for access by the buyer.

Claim 11 The system according to claim 10, wherein the input means is a computer.

Claim 12 The system according to claim 11, wherein the selection means is a central computer.

Claim 13 The system according to claim 12, wherein the transmission means includes an internet system.

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Claim 14 The system according to claim 13, wherein the reception means includes a central computer.

Claim 15 The system according to claim 14, wherein the computation means includes the central computer.

Claim 16 The system according to claim 14, wherein the output means includes an internet connection.

Claim 17 The system of claim 16, wherein the goods are selected from the group consisting of vehicle computers or appliances.

Claim 18 The system according to claim 17, wherein the goods are vehicles.

Claim 19 A system for obtaining information for the purchasing of automobiles by prospective buyers comprising:

input means, including a computer, for receiving a request for a desired automobile from a prospective buyer, the request including plurality of predetermined criteria related to the automobile;

selection means, including central computer, for selecting at least two providers from a predetermined group of providers of the automobile based on the plurality of predetermined criteria;

transmission means, including an internet connection, for transmitting the request for the prospective buyer to the selected providers;

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reception means, including the central computer, for receiving, within a predetermined time interval, responses from the selected providers;

computation means, including the central computer, for compiling information provided in the response received within the predetermined time interval for ranking the providers based upon the compiled information including the plurality of criteria, and for selecting providers with the relatively highest ranking; and

output means, including an internet connection, for providing the compiled responses of the selected providers for access by the prospective buyer.

Claim 20 The system of claim 19, wherein the automobile is a previously owned automobile.